

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 05-CV-00329-GKF-SAJ |
| |) | |
| TYSON FOODS, INC., et al., |) | |
| |) | |
| Defendants. |) | |

**STATE OF OKLAHOMA'S BRIEF IN OPPOSITION TO "PETERSON
FARMS, INC.'S MOTION FOR PROTECTIVE ORDER PROHIBITING
FURTHER EX PARTE COMMUNICATIONS BETWEEN PLAINTIFFS'
[SIC] COUNSEL AND KERRY KINYON AND STRIKING PLAINTIFFS'
[SIC] REQUESTS FOR PRODUCTION OF DOCUMENTS"**

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COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully requests that "Peterson Farms, Inc.'s Motion for Protective Order Prohibiting Further Ex Parte Communications Between Plaintiffs' [sic] Counsel and Kerry Kinyon and Striking Plaintiffs' [sic] Requests for Production of Documents" [DKT #1310] be denied in its entirety.

I. Introduction

Defendant Peterson Farms, Inc. ("Defendant Peterson"), without any evidence, feeling unconstrained by the facts, and unjustifiably assuming the worst about the State's counsel, has leveled some very serious allegations against the State's counsel -- namely that the State's counsel's contacts with Mr. Kerry Kinyon, the former chief operating officer and executive vice president of operations for Defendant Peterson, were improper under the Oklahoma Rules of Professional Conduct. *See* Peterson Motion, p. 8. Nothing could be further from the truth. As will be demonstrated below, the State's counsel's contacts with Mr. Kinyon have at all times been consistent with the highest professional standards. Attempts by Defendant Peterson to impugn the State's counsel's integrity with scurrilous, false accusations are flatly improper.¹

The Oklahoma Rules of Professional Conduct allow the State's counsel to communicate with Mr. Kinyon outside the presence of Defendant Peterson. *See Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992), *reh'g denied* ("ex parte communications with former employees are not prohibited"). Further, the State's counsel had, and have, no intention of inquiring into or eliciting

¹ The leveling of such unfounded allegations by Defendant Peterson runs perilously close to violating LCvR 83.8(e), which provides that "[l]awyers should treat each other, the opposing party, the Court, and members of the Court staff with courtesy and civility and conduct themselves in a professional manner at all times."

any privileged information Mr. Kinyon might have. Yet further, the State's counsel have put in place a series of protections to ensure against receiving any privileged information in the unlikely event that such information were to be inadvertently disclosed.² Therefore, Defendant Peterson's motion for protective order should be denied.

Additionally, given that Peterson's Motion confirms that it is indeed Defendant Peterson's intention to impeach Mr. Kinyon by portraying him, amongst other things, as a disgruntled, "bitter" former employee, the State is entitled to Mr. Kinyon's personnel file. The State is likewise entitled to copies of all written communications between Defendant Peterson and Mr. Kinyon since his departure from the company. Accordingly, Defendant Peterson's motion to strike the State's discovery should be denied.

In sum, Defendant Peterson's Motion should be denied in its entirety. Further, the Court should caution Defendant Peterson against making such unfounded, scurrilous, false accusations against the State's counsel in the future.

II. Facts

1. Mr. Kinyon, the former chief operating officer and executive vice president of operations for Defendant Peterson contacted the State's counsel in February 2007, seeking to "tell his story" -- a story according to Mr. Kinyon "that quite possibly could shape the character and practices of a particular company as one that disregards regulations and ethics." *See* Exhibit 1-A.³

² Indeed, the State's counsel have received no privileged information from Mr. Kinyon.

³ The State is attaching copies of all of the written correspondence between Mr. Kinyon and the State as Exhibit 1-A through 1-F. The State has redacted Mr. Kinyon's e-mail address, street address and phone numbers in order to protect his privacy.

2. The State's counsel responded to Mr. Kinyon that they would get back to him shortly. *See* Exhibits 1-A & 1-B.

3. The State's counsel not only conducted its own research into the applicable ethics issues, but also consulted with multiple ethics experts on whether and the manner in which further communications with Mr. Kinyon would be ethically permissible. *See* Exhibit 2, ¶ 9.

4. Further, the State's counsel were fully-cognizant of their obligations under Oklahoma Rules of Professional Conduct 4.3 and 4.4, and took special care to ensure that these obligations would be satisfied.

a. First, as an initial matter, the State's counsel had, and have, no intention of eliciting or inquiring into any privileged information Mr. Kinyon might have. *See* Exhibits 2, ¶ 10 & 3, ¶ 11.

b. Second, the State's counsel expressly informed Mr. Kinyon of the identity of the party they represented in this lawsuit, and that the State's interests were adverse to Defendant Peterson. *See* Exhibits 1-C, 2, ¶ 12 & 3, ¶ 11.

c. Third, the State expressly told Mr. Kinyon not to reveal any privileged information in his communications with the State's counsel. *See* Exhibits 1-C & 3, ¶ 11.

d. Fourth, the State's counsel chose an experienced attorney well-versed in ethics, Mr. Don Bingham, to handle all communications and contacts with Mr. Kinyon. *See* Exhibit 2, ¶ 16.

e. Fifth, as protection against the unlikely event that privileged information might inadvertently be disclosed to him, the State's counsel, as an additional precaution, walled Mr. Bingham off from the work of the State's counsel in the case. *See* Exhibits 2, ¶ 17 & 3 ¶ 12.

f. Sixth, as yet a further precaution, the State's counsel set up a process whereby any substantive information received by Mr. Bingham would first be reviewed by retired Oklahoma Supreme Court Justice Daniel J. Boudreau to make certain that no privileged information might inadvertently pass to the State's counsel. *See* Exhibits 2, ¶ 18 & 3, ¶ 12.

5. Between February and May 2007, Mr. Bingham and Mr. Kinyon exchanged approximately 10 e-mails. *See* Exhibits 1-C through 1-F & 3, ¶ 13. Additionally, during this time-frame, Mr. Bingham and Mr. Kinyon spoke by telephone on several occasions. *See* Exhibit 3, ¶ 13. These telephone communications are described in the State's August 9, 2007 letter to Defendant Peterson. *See* Exhibit 1.

6. Other than the initial responses to Mr. Kinyon's February e-mails, *see* Exhibits 1-A & 1-B, since February 2007, none of the State's counsel in this matter besides Mr. Bingham has engaged in written communications with Mr. Kinyon. *See* Exhibits 2, ¶ 19 & 3, ¶ 15.

7. Other than Mr. Bingham, since February 2007, none of the State's counsel in this matter has engaged in oral communications with Mr. Kinyon. *See* Exhibits 2, ¶ 20 & 3, ¶ 16.

8. Neither Mr. Bingham nor any of the State's other counsel in this matter has, since February 2007, met in person with Mr. Kinyon. *See* Exhibits 2, ¶ 21 & 3, ¶ 17.

9. Neither Mr. Bingham nor any of the State's other counsel in this matter has, since February 2007, received any documents from Mr. Kinyon. *See* Exhibits 2, ¶ 22 & 3, ¶ 18.

10. Neither Mr. Bingham nor any of the State's other counsel in this matter has paid or offered to pay Mr. Kinyon for any documents, consultations or testimony. *See* Exhibits 2, ¶ 24 & 3, ¶ 20.

11. Neither Mr. Bingham nor any of the State's other counsel in this matter has paid or offered to pay Mr. Kinyon for any privileged information. *See* Exhibits 2, ¶ 23 & 3, ¶ 21.

12. Neither Mr. Bingham nor any of the State's other counsel in this matter has inquired of privileged matters with Mr. Kinyon. *See* Exhibits 2, ¶ 26 & 3, ¶ 22.

13. Neither Mr. Bingham nor any of the State's other counsel in this matter has received any privileged information from Mr. Kinyon. *See* Exhibits 2, ¶ 25 & 3, ¶ 21.

14. On June 1, 2007, in response to an interrogatory, the State disclosed to Defendant Peterson that communications had occurred between the State's counsel and Mr. Kinyon.

15. Waiting more than a month and a half after receiving the State's interrogatory response, Defendant Peterson subsequently began sending a series of demanding letters to the State's counsel, *inter alia*, seeking to discover the content of the State's counsel's communications with Mr. Kinyon and demanding that all such communications immediately cease. *See* Exhibits 4-A through 4-D.

16. The State has disclosed to Defendant Peterson all written communications between it and Mr. Kinyon. *See* Exhibit 1 (including attachments). However, as is its right, the State has not agreed to refrain from further communications with Mr. Kinyon.

17. Despite the fact that the communications contain absolutely no evidence of any ethical impropriety and despite the fact that the State has informed Defendant Peterson that it has taken steps to ensure that its conduct has at all times comported with the letter and spirit of the Oklahoma Rules of Professional Conduct, *see* Exhibits 1 (including attachments) & 5, Defendant Peterson has nevertheless chosen to assume the worst about the State's counsel and has leveled unfounded, scurrilous, false accusations against the State's counsel in its Motion.

III. Argument

A. Nothing in the Oklahoma Rules of Professional Conduct prohibits the State's counsel's contacts with Mr. Kinyon

Interpreting Oklahoma Rule of Professional Conduct 4.2, the Oklahoma Supreme Court has clearly spoken on the propriety of *ex parte* contacts with former employees: "*ex parte* communications with former employees are not prohibited." *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992), *reh'g denied* (emphasis added).⁴ Additionally, as explained by the Oklahoma Supreme Court in *Fulton*, 829 P.2d at 960, "[t]he attorney-client privilege does not bar a plaintiff's attorney from interviewing a defendant corporation's employees." (Citation omitted.) It logically follows from this statement that the attorney-client privilege does not bar a plaintiff's attorney from interviewing a defendant corporation's former employees. Thus, merely because a former employee may have had access to attorney-client communications, an attorney is not precluded under Oklahoma Rule of Professional Conduct 4.2 from having *ex parte* contacts with the former employee. *See, e.g., Aiken v. Business and Industry Health Group, Inc.*, 885 F.Supp. 1474, 1479-80 (D. Kan. 1995) ("Defendant's final argument is that *ex parte* contact should be prohibited under Rule 4.2 because some of the former employees plaintiff wishes to speak with

⁴ Defendant Peterson states that "[t]he issue presented in the case at bar was not passed on by the court, as *Fulton* involved *ex parte* communications with current employees of a party." Peterson Motion, p. 9. Defendant Peterson is wrong. The trial court order on review before the Oklahoma Supreme Court "prohibit[ed] all *ex parte* communications with any employee or former employee of St. Simeon's regarding any facts, information or opinions concerning the negligence action." *Fulton*, 829 P.2d at 960 (emphasis added). *Fulton*, thus, involved the question of *ex parte* contacts with both present and former employees. Additionally, Defendant Peterson suggests that the Court's holding regarding the propriety of *ex parte* contacts with former employees is *dicta*. Defendant Peterson gets this fact wrong as well. In *Fulton*, as just noted, the order on appellate review "prohibit[ed] all *ex parte* communications with any . . . former employee" In granting the writ of mandamus, the Oklahoma Supreme Court accordingly held that "[b]ecause former employees may not speak for or bind St. Simeon, *ex parte* communications with former St. Simeon employees are not prohibited." *Fulton*, 829 P.2d at 961.

possess information subject to the physician-patient privilege. Defendant's concern does not justify an absolute proscription against *ex parte* contacts. Contrary to defendant's assertion, the former employee's mere possession of privileged information gained during the employment relationship is not the kind of current employment or agency-type relationship that is required to even arguably bring a former employee within the ambit of Rule 4.2") (citation omitted).

B. The State's counsel's conduct in connection with its contacts with Mr. Kinyon has at all times fully comported with the requirements of the Oklahoma Rules of Professional Conduct

As just demonstrated, Oklahoma Rule of Professional Conduct 4.2 clearly allows the State's counsel to contact Mr. Kinyon *ex parte*. However, the State's counsel freely acknowledge that there are restrictions on both (1) the way in which they may deal with Mr. Kinyon, and (2) the subjects they may discuss with Mr. Kinyon.

With respect to the former, Oklahoma Rule of Professional Conduct 4.3 states that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. A lawyer shall not give legal advice to such a person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being, in conflict with the interests of the client.

Accordingly, "[p]laintiff's counsel is . . . required to comply with Rule 4.3 by making clear to the former employees the nature of his role in the case, including the identity of the plaintiff and the defendant." *Aiken*, 885 F. Supp. at 1480.

With respect to the latter, Oklahoma Rule of Professional Conduct 4.4(a) states that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]." Such rights include unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. *See, e.g.*, Comment 1 to 2008 Amendments to Oklahoma Rule of Professional Conduct 4.4. Thus, "plaintiff's counsel must take care not to

seek to induce or listen to disclosures by former employees of privileged communications."

Aiken, 885 F. Supp. at 1480.

1. The State's counsel have fully complied with Oklahoma Rule of Professional Conduct 4.3

In the very first paragraph of its March 12, 2007 e-mail to Mr. Kinyon, Mr. Bingham, in accordance with Oklahoma Rule of Professional Conduct 4.3, clearly identified his role and the State's interest in the case:

I am an attorney at Riggs, Abney, Neal, Turpen, Orbison & Lewis, a law firm that is representing the State of Oklahoma in its lawsuit against the poultry industry for alleged pollution of the Illinois River Watershed. One of the defendants in this lawsuit is Peterson Farms, and obviously the State's interests are adverse to Peterson Farms.

Exhibit 1-C. Indeed, it is safe to conclude that Mr. Kinyon was never under any misapprehension of the State's counsel's role in this case. After all, it was Mr. Kinyon who first contacted the State's counsel in this case by e-mail, and that e-mail plainly reflects that the reason he contacted the State's counsel was due to their role in the poultry litigation. Thus, the requirements of Oklahoma Rule of Professional Conduct 4.3 have been fully satisfied.

Defendant Peterson nonetheless asserts "by providing the avenue" for Mr. Kinyon to potentially disclose privileged information, the State has violated Oklahoma Rule of Professional Conduct 4.3. This assertion simply does not hold up to scrutiny when viewed against the facts. As previously stated, the State's counsel had, and have, no intention of inquiring into or eliciting any privileged information Mr. Kinyon might have. Indeed, the State's counsel cautioned Mr. Kinyon not to disclose privileged information and utilized an experienced attorney well-versed in legal ethics (Mr. Bingham) to handle all contacts with Mr. Kinyon. Yet further, the State's counsel have gone the extra mile and put in place additional protections to ensure against receiving any privileged information in the unlikely event that such information were to be

inadvertently disclosed. These protections include walling Mr. Bingham off from the work of the State's other counsel in this action, and utilizing a former Oklahoma Supreme Court Justice (the Honorable Daniel J. Boudreau) to review any substantive information received from Mr. Kinyon. Defendant Peterson's suggestion that the State's counsel were seeking to induce Mr. Kinyon to turn over privileged information thus is scurrilous and false.

2. The State's counsel have fully complied with Oklahoma Rule of Professional Conduct 4.4

Defendant Peterson asserts that because Mr. Kinyon may have had access to privileged information while in its employ, Oklahoma Rule of Professional Conduct 4.4 precludes the State from contacting him *ex parte*. Defendant Peterson's assertion is simply incorrect.

At the outset, it bears repeating yet again that the State's counsel had, and have, no intention of inquiring into or eliciting any privileged information Mr. Kinyon might have. As noted previously, the State's counsel cautioned Mr. Kinyon not to disclose privileged information. Defendant Peterson contends that the State's caution was insufficient. Defendant Peterson bases this contention on the assertion that Mr. Kinyon is not an attorney and that there is no indication that he has the ability to discern what information is privileged. Defendant Peterson's assertion rings hollow when viewed against Defendant Peterson's earlier assertion that "[Mr.] Kinyon was an integral part of Peterson's legal team." *See* Peterson Motion, p. 3. That Defendant Peterson would entrust its privileged communications -- its "crown jewels" -- to someone who could not discern what was privileged and what was not is simply not credible. In fact, prior to his departure from the company, Defendant Peterson apparently trusted Mr. Kinyon to know the difference.

In any event, as discussed below, the caselaw provides that the mere fact that a former employee had been privy to privileged information does not preclude *ex parte* contact with that

former employee. Provided that there is no intention to invade the privilege, such contacts may take place. For example, the United States District Court for the District of Kansas denied a motion for protective order in similar circumstances, reasoning:

Plaintiff's counsel has informed the court that he will not seek information which would require any former employee to reveal a patient's confidences, but is instead interested in information such as the former employees' knowledge of plaintiff, defendant's methods of operating, the way in which those methods expose defendant's core values and the techniques which the defendant used to exert control over its employees. Counsel for plaintiff has also represented that he will refrain from inquiring about privileged information and will warn former employees not to reveal such information. In light of plaintiff's representations that he intends to comply with applicable rules, a protective order is unnecessary. Defendant simply has not shown that the physician-patient privilege likely will be infringed.

Aiken, 885 F. Supp. at 1480. Similarly, in *Lyondell-Citco Refining, LP v. Petroleos de Venezuela, S.A.*, 2003 WL 22990099, *3 (S.D.N.Y. Dec. 19, 2003), the United States District Court for the Southern District of New York denied a motion for protective order, reasoning:

Defendants seek this protective order on the grounds that the individuals in question are likely to have been exposed to privileged or confidential information, or to have been privy to business proprietary information and/or trade secrets. However, we find that the circumstances of this case do not warrant the imposition of a bar on *ex parte* communications. As regards privileged material, we find that defendants' interests will be sufficiently protected by two stipulations made by plaintiff, in its response to defendants' motion. First, plaintiff has stipulated that all interviews will be conducted by attorneys, thus avoiding the hazard noted in *G-I Holdings*, where "[t]he danger of inadvertent disclosure is compounded by the fact that the investigators are themselves lay persons and, thus, are in little better position than the interviewees to assess whether privileged material is being disclosed." Second, plaintiff has stipulated that the questions will be targeted so as to avoid any discussion of privileged information.

(Citation omitted.) *See also Spencer v. Steinman*, 179 F.R.D. 484, 492 (E.D. Pa. 1998) ("the communications between Wood and Lawrence did not violate Rules 4.2, 1.6, or 1.9 of the Pennsylvania Rules of Professional Conduct because Wood was not seeking information which was protected by the attorney-client privilege, and, in any event, Lawrence did not disclose any

privileged or confidential information to Wood"); *Dillon Companies, Inc. v. Sico Company*, 1993 WL 492746, *5 (E.D. Pa. Nov. 24, 1993) (denying motion for relief where there was only "a perceived risk of a breach of attorney-client privilege" and there had been no breach of the attorney-client privilege); *Smith v. Kalamazoo Ophthalmology*, 322 F.Supp.2d 883, 891 (W.D. Mich. 2004) ("In this case, Defendant has failed to show that Piper inquired into privileged matters during his communications with Salliotte. Piper has indicated that he took appropriate precautions against disclosure of privileged information by informing Salliotte that he would not be inquiring into discussions Salliotte had with Thelen or any other attorney and that he did not inquire into areas likely to involve privileged communications, such as negotiations, settlement strategy, or settlement posture in the administrative proceeding. Because Piper is an officer of the Court, the Court may accept Piper's representations as true").

Defendant Peterson can point to no actual disclosure of privileged information. Rather, Defendant Peterson points to a "confidential envelope" that Mr. Kinyon apparently contemplated sending to Mr. Bingham, asserting: (1) that this fact demonstrates a willingness by Mr. Kinyon to disclose privileged information, and (2) that the fact that the State's counsel did not tell Mr. Kinyon not to send it demonstrates a willingness by State's counsel to invade Defendant Peterson's privileges.⁵ Defendant Peterson's assertions are built on suppositions that do not hold up to scrutiny. First, there is nothing to suggest that this envelope (which was never received by the State's counsel) contained privileged information.⁶ Although it is a distinction that

⁵ Defendant Peterson also asserts that Mr. Kinyon expressed a desire to sell this information to the State's counsel. This assertion is false.

⁶ As explained in the State's counsel's August 9, 2007 letter to Defendant Peterson, "Mr. Kinyon did not describe or characterize the contents or information that was to be enclosed in his confidential envelope" See Exhibit 1. Without any factual support whatsoever, Defendant Peterson nevertheless jumps to the conclusion that it would have included privileged

Defendant Peterson apparently chooses to ignore, there is of course a significant difference between "confidential" information and "privileged" information. Second, Defendant Peterson's assertions ignore the fact that the State's counsel (*i.e.*, Mr. Bingham) cautioned Mr. Kinyon against disclosing any privileged information. Even assuming *arguendo* that it was his intent to reveal Defendant Peterson's privileged information (an assumption that to the best of the State's knowledge has no basis in fact), Mr. Kinyon surely must have recognized that it would do no good for him to send something that the State's counsel would not look at. Third, that the State's counsel have had no intention of invading Defendant Peterson's privileges is demonstrated by the fact that the State's counsel have put in place protections to ensure against receiving any privileged information in the unlikely event that such information were inadvertently disclosed. Simply put, the State's counsel's conduct has at all times complied with the letter and the spirit of Oklahoma Rule of Professional Conduct 4.4.

Defendant Peterson's reliance on the unreported decision *Arnold v. Cargill, Inc.*, 2004 WL 2203410 (D. Minn. Sept. 24, 2004), in support of its contention that the State's counsel have violated the Oklahoma Rules of Professional Conduct is entirely unavailing. *Arnold* is easily distinguished. *Arnold* involved a situation where the Court found, *inter alia*, that the plaintiffs' counsel "took grossly inadequate measures to prevent the disclosure of privileged information from [the former employee]." *See Arnold*, 2004 WL 2203410, *9. Specifically, the Court found that "it appears that S&L actually encouraged Douglas [*i.e.*, the former employee] to send over to its offices 'any documents' pertaining to Cargill, including privileged documents. In fact, Douglas testified that he asked S&L what to do with documents marked privileged and

information. Additionally, the question arises that if Defendant Peterson actually believed that Mr. Kinyon had Defendant Peterson's privileged documents in his possession, why has Defendant Peterson not taken immediate steps to secure their return.

confidential and was told to send them all over to S&L and told that they would go through them." *See Arnold*, 2004 WL 2203410, *8 (emphasis added). Nothing of the sort has occurred here.⁷ The State's counsel have unequivocally not encouraged Mr. Kinyon to disclose privilege information to them. In fact, they have cautioned him not to disclose such information. Further, as described above, the State's counsel painstakingly put in place multiple layers between it and Mr. Kinyon to ensure that, in the event that there were an inadvertent disclosure of privileged information by Mr. Kinyon, the State's counsel would not be exposed to that information.

Simply put, Defendant Peterson's assertions are built upon unfounded supposition upon unfounded supposition, and not facts. There are no facts supporting Peterson's assertion that State's counsel have violated any of the Oklahoma Rules of Professional Conduct, including but not limited to Oklahoma Rules of Professional Conduct 4.2, 4.3 or 4.4. Rather, the facts support exactly the opposite conclusion: that at all times the State's counsel have fully complied with the letter and the spirit of the Oklahoma Rules of Professional Conduct.

C. Defendant Peterson has failed to carry its burden in establishing the need for or propriety of the requested protective order

"As the moving party, defendants bear the burden to demonstrate grounds for a protective order. They should show facts from which the court can find that a party or counsel is probably

⁷ It is worth noting that Defendant Peterson did not cite two reported decisions out of the United States District Court for the District of Minnesota dealing with contacts with former employees. In *FleetBoston Robertson Stephens, Inc. v. Innovex, Inc.*, 172 F.Supp.2d 1190, 1195 (D. Minn. 2001), the court denied defendants' motion to exclude evidence, explaining: "[P]laintiff's counsel in this case contacted defendants' former CEO to discuss matters relevant to the litigation. At no point, however, did plaintiff's counsel solicit any privileged information and Sanghi did not relate such information. Thus, . . . plaintiff's lawyers in this case did not violate Rule 4.2." And in *Olson v. Snap Products, Inc.*, 183 F.R.D. 539, 545 (D. Minn. 1998), the court found no violation of Rule 4.2 and denied defendants' motion to disqualify plaintiff's counsel who had contacted a former employee who had served as vice-president of operations and a former employee who had served as chief executive officer where plaintiff's counsel did not inquire as to privileged matters, and no privileged matters were disclosed.

engaging or about to engage in the unethical conduct of which they complain." *Turnbull v. Topeka State Hospital*, 185 F.R.D. 645, 651 (D. Kan. 1999). Defendant Peterson contends that it has established a *prima facie* case for precluding any further *ex parte* contacts by the State's counsel. See Peterson Motion, p. 8. It has done nothing of the sort. "Speculation does not constitute an adequate basis for a protective order." *Turnbull*, 185 F.R.D. at 652 (denying motion where movants "have provided neither by affidavit nor anything else of record any indication that plaintiff and her counsel have either done anything improper or are about to do so"). Given that the State's counsel have at all times fully complied with the requirements of the Oklahoma Rule of Professional Conduct, have at all times dealt fairly with Mr. Kinyon, have made clear that they have no intention of inquiring into or eliciting any privileged information Mr. Kinyon might have, have cautioned Mr. Kinyon not to disclose privileged information, and have even gone the extra mile to put in place protections to ensure against receiving any privileged information in the unlikely event that such information were to be inadvertently disclosed, there is no basis for the protective order Defendant Peterson seeks. See, e.g., *Aiken*, 885 F.Supp. at 1480; *Lyondell-Citco Refining*, 2003 WL 22990099, *3; *Spencer*, 179 F.R.D. at 492; *Dillon Companies*, 1993 WL 492746, *5; *Smith*, 322 F.Supp.2d at 891. Defendant Peterson's Motion should be denied.

D. There is no valid basis for the Court to further evaluate Defendant Peterson's scurrilous, false accusations against the State's counsel via an *in camera* hearing

As demonstrated above, the State's counsel's conduct in connection with its contacts with Mr. Kinyon has been in full accord with the Oklahoma Rules of Professional Conduct. This matter should have ended with the State's August 9, 2007 letter to Defendant Peterson, wherein the State laid out in detail the facts surrounding its contacts with Mr. Kinyon and provided

Defendant Peterson with copies of the written communications between it and Mr. Kinyon. *See* Exhibit 1 (including attachments). Despite having received this fulsome accounting from officers of the Court, Defendant Peterson nevertheless continues to press this issue, trying to create an issue where none exists. One way Peterson has done this is by playing loose with the "facts." For example, and without limitation:

- On page 1 of its Motion, Defendant Peterson states: "Mr. Kinyon . . . has expressed a desire to sell information to Plaintiffs [sic]." There is nothing in the record to support this statement by Defendant Peterson.
- On page 2, footnote 1, of its Motion, Defendant Peterson states that: ". . . Plaintiffs' [sic] counsel refused to budge on all of the issues" This is incorrect. The State has disclosed not only the nature of its communications with Mr. Kinyon, but also copies of the written communications. The only issue of the many raised by Defendant Peterson on which the State's counsel "refused to budge" was to agree to refrain from any further contacts with Mr. Kinyon.
- On page 3 of its Motion, Defendant Peterson states that: "Although he stated, 'I am not pursuing a big payday . . . ,' [Mr. Kinyon] clearly was pursuing a payday of some magnitude." There is nothing in the record to support Defendant Peterson's assertion that Mr. Kinyon "clearly was pursuing a payday of some magnitude."
- On page 4 of its Motion, Defendant Peterson states that the State's counsel's March 12, 2007 "email made mention of ethical issues that Plaintiffs' [sic] counsel wanted to address before proceeding with further communications." This characterization is misleading. Ethical issues were plainly the centerpiece of the March 12, 2007 e-mail. The e-mail more than merely "made mention" of these issues. *See* Exhibit 1-C.
- On page 4 of its Motion, Defendant Peterson states that the State's counsel "claims that the only substantive information that was discussed by [Mr.] Kinyon was the fact that [Mr.] Kinyon was aware of certain conduct by Peterson that he wanted to reveal to Plaintiffs [sic]" and that "Plaintiffs' [sic] counsel claim that they have received no . . . envelope [from Mr. Kinyon]." The State's counsel are officers of the Court. These are not "claims" but facts. Defendant Peterson has come forward with no evidence to the contrary, and its use of such language is inappropriate.
- On page 5 of its Motion, Defendant Peterson states that it learned that: "[Mr.] Kinyon had offered to sell Peterson's confidences and privileged information to Plaintiffs [sic]" As noted above, there is nothing in the record to support this statement by Defendant Peterson.

- On page 6 of its Motion, Defendant Peterson states that Mr. Kinyon had expressed a "willingness to breach Peterson's privileges" There is nothing in the record to support this statement by Defendant Peterson.
- On page 11 of its Motion, Defendant Peterson states that: ". . . [the State's counsel] were very much anticipating that [Mr.] Kinyon's anger and lack of sophistication would lead to the disclosure of information and documents which the law would otherwise protect." There is nothing in the record to support this statement by Defendant Peterson, and in fact precisely the opposite is true. The State's counsel had, and have, no intention of inquiring into or eliciting any privileged information Mr. Kinyon might have. Yet further, the State's counsel have gone the extra mile to put in place protections to ensure against receiving any privileged information in the unlikely event that such information were to be inadvertently disclosed.
- On page 13 of its Motion, Defendant Peterson states that: "[Mr. Kinyon] made it very clear to Plaintiffs' [sic] counsel that he knew confidential information and that he was willing to divulge that information for the right price." As noted above, there is nothing in the record to support this assertion by Defendant Peterson that Mr. Kinyon offered to sell information to the State.

There are more examples, but the foregoing examples give a flavor of Defendant Peterson's willingness to play loose with the "facts." What is equally disturbing is the unjustified negative spin it puts on facts in order to create an issue where none exists. The Court must have some factual bases or grounds on which to conduct an *in camera* hearing. Defendant Peterson has provided no such factual grounds⁸ because of course there are none. Defendant Peterson is wasting the State's and the Court's time. No further inquiry is required. Indeed, as pointed out above, this matter should have ended long ago with the State's August 9, 2007 letter.

E. Given Defendant Peterson's clear signal that it intends to impeach Mr. Kinyon, the State's discovery requests concerning Defendant Peterson's post-employment contacts with Mr. Kinyon and Mr. Kinyon's personnel file are relevant

As noted above, Mr. Kinyon, the former chief operating officer and executive vice president of operations for Defendant Peterson contacted the State's counsel seeking to "tell his

⁸ It is telling that Defendant Peterson has provided no affidavits in support of the "facts" it asserts. Any such affidavits should, of course, have been provided in connection with its initial moving papers.

story" -- a story according to Mr. Kinyon "that quite possibly could shape the character and practices of a particular company as one that disregards regulations and ethics." *See* Exhibit 1-A. That particular company apparently is Defendant Peterson.

Peterson's Motion is replete with attempts to characterize Mr. Kinyon as a person with a bias against Defendant Peterson. Indeed, on page 3 alone of its Motion, Defendant Peterson makes the following assertions:

- "It has since become clear that Mr. Kinyon did not leave his [sic] employ a happy man."
- "These actions and the following history reflect that Kinyon is a bitter man"
- "Kinyon's anger and resentment associated with his separation from Peterson is clearly portrayed in the e-mail."

Such assertions signal a clear intention by Defendant Peterson to attempt to impeach Mr. Kinyon if and when he gives testimony in this action. Correctly suspecting that this was going to be Defendant Peterson's approach, on September 13, 2007, the State served discovery on Defendant Peterson seeking, *inter alia*, Mr. Kinyon's personnel file, including all work evaluations of Mr. Kinyon. *See* Exhibit 6 (Request No. 23). Such information is plainly relevant to the question of bias, and the discovery request is by no means the "fishing expedition" that Defendant Peterson seeks to portray it as. In fact, given Peterson's statements, there is ample justification for the State's discovery request.⁹ Defendant Peterson has put the events surrounding Mr. Kinyon's departure at issue. The contents of Mr. Kinyon's personnel file may well contain information

⁹ Defendant Peterson states "[i]t is worthy of note that out of the hundreds of employees that are or were employed by the Defendants in this action, Plaintiffs [sic] have requested this type of information about only one -- Kinyon." Peterson Motion, p. 19. If anything, this fact underscores the propriety of the State's discovery request. Were Defendant Peterson's attacks on Mr. Kinyon not so vociferous and its intent to impeach so plain, the State would not be seeking this information.

that is contrary to Defendant Peterson's current portrayal of him as, amongst other things, a disgruntled, "bitter man."

The State has also requested copies of all correspondence between Defendant Peterson (including its attorneys) and Mr. Kinyon since Mr. Kinyon's departure from Defendant Peterson's employ. *See* Exhibit 6 (Request No. 22). It is strange indeed that Defendant Peterson would send a letter to the State's counsel asking that they produce copies of all communications between them and Mr. Kinyon, yet at the same time contend a similar request by the State to Defendant Peterson is somehow improper. There can be no double-standard here. Moreover, the State submits that the tenor of Defendant Peterson's conduct in this entire matter has been heavy-handed and threatening, and the State is entitled to know if that tone has extended to any communications that Defendant Peterson has had with Mr. Kinyon.

For these reasons, the State is entitled to the requested discovery. In the unlikely event that the Court determines that such discovery by the State should not be had, however, the State submits that the Court must also preclude any efforts by Defendant Peterson to impeach Mr. Kinyon (1) on the basis of the circumstances of his departure from Defendant Peterson, and (2) on the basis of his current views or attitude toward Defendant Peterson.

IV. Conclusion

The State's conduct with respect to its contacts with Mr. Kinyon has at all times comported fully with the Oklahoma Rules of Professional Conduct. Not only has the State's counsel had no intention of eliciting or inquiring into any privileged information Mr. Kinyon might have, but also the State's counsel have put in extensive protections to guard against any inadvertent disclosure of privileged information to them. Accordingly, there is no basis for entry of a protective order precluding further contacts by the State's counsel with Mr. Kinyon. Further,

there is no valid basis for the Court to further evaluate Defendant Peterson's scurrilous, false accusations against the State's counsel via an *in camera* hearing. Finally, given its clear intention to attempt to impeach Mr. Kinyon, Defendant Peterson's motion to strike the State's discovery is improper. In sum, the State of Oklahoma requests that "Peterson Farms, Inc.'s Motion for Protective Order Prohibiting Further Ex Parte Communications Between Plaintiffs' [sic] Counsel and Kerry Kinyon and Striking Plaintiffs' [sic] Requests for Production of Documents" [DKT #1310] be denied in its entirety.

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